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IN THE

Supreme Court of the United States

MAJOR LEAGUE BASEBALL PLAYERS ASSOCIATION,
Petitioner,

v.

CARDTOONS, L.C.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

In this case, the *en banc* court of appeals held that an objectively reasonable threat of litigation is not protected from retaliatory state law claims by the *Noerr-Pennington* doctrine or the First Amendment right to petition on which that doctrine is founded. Unlike respondent Cardtoons, the *en banc* majority and dissenting judges recognized that the ruling creates a conflict among the courts of appeals and is in tension with decisions of this Court; that the issue is important and recurring; and that the court of appeals' holding "encourages, nay demands, more litigation." App. 17a. Moreover, and again contrary to Cardtoons, this case squarely presents the legal issue in question: Petitioner MLBPA sent Champs an objectively reasonable cease-and-desist letter based on its contributory infringement of Major League Players' publicity rights, and Cardtoons alleged that this letter by itself constituted tortious conduct. Nor does the existence of additional state law defenses to Cardtoons' retaliatory tort claims militate against certiorari to review the federal question presented and decided below. The MLBPA had a constitutional right to send an objectively reasonable cease-and-desist letter to Champs, and that right should not be chilled or infringed by the burden of defending retaliatory state law tort claims that are based solely on such a letter. For all of these reasons as well as others set forth in the petition, this Court should grant certiorari.

I. THERE IS A CONFLICT AMONG THE COURTS OF APPEALS ON THE QUESTION PRESENTED.

There is no merit to Cardtoons' claim that the court of appeals' holding does not create a conflict on the question presented by this case. Until this case, all courts of appeals which considered the question applied the *Noerr-Pennington* doctrine and the right to petition to protect objectively

reasonable lawsuits and cease-and-desist letters from retaliatory claims. Cardtoons asserts, however, that the Tenth Circuit is the first court of appeals to decide the specific question whether the *Noerr-Pennington* doctrine and the right to petition protect objectively reasonable *cease-and-desist letters* from retaliatory *state law tort claims* and therefore that its decision does not create a conflict.

This argument surely has the tail wagging the dog. The *Noerr-Pennington* doctrine is founded on the right to petition, and the scope of the protection it provides to petitioning activity is strictly a function of the *constitutional right* to be preserved, not the statutory right or duty alleged to be violated. See Pet. 12. Indeed, any other approach would be flatly inconsistent with the rule that an antitrust exemption must be narrowly confined and no broader than absolutely necessary to protect the relevant basis for creating an immunity. See *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 421 (1986). If objectively reasonable cease-and-desist letters are protected from retaliatory antitrust claims under the *Noerr-Pennington* doctrine, this can only be so because such letters constitute petitioning activity within the meaning of the First Amendment and are protected from all retaliatory claims, be they antitrust claims or state law tort claims.

This point also follows inexorably from decisions of this Court which have clearly held that objectively reasonable petitioning activity is protected from all retaliatory lawsuits, not just antitrust claims. See Pet. 12-13 (discussing, *inter alia*, *Bill Johnson's Rests., Inc.* v. *NLRB*, 461 U.S. 731, 734 (1983) (protecting right to petition from retaliatory claim under the National Labor Relations Act); *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49, 59 (1993) ("*PREI*") (noting that the right to petition applied "in other contexts")). The courts of appeals have faithfully followed this teaching. See *id.* 11-12. There is *nothing* in federal antitrust law or this Court's decisions that

even remotely suggests that the scope of the right to petition varies based on the law the petitioning activity is alleged to violate. "There is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right to petition than can a statutory claim such as antitrust." *Video Int'l Prod., Inc.* v. *Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988). See also Gary Myers, *Antitrust and the First Amendment Implications of Professional Real Estate Investors*, 51 Wash. & Lee L. Rev. 1199, 1240 (1994) ("[t]here is no reason to believe . . . that these [*Noerr-Pennington*] principles are limited to antitrust cases").[1]

The *en banc* majority did not even attempt to explain why the right to petition would protect objectively reasonable cease-and-desist letters against antitrust claims and no others, Pet. 12-13; and Cardtoons' brief contains no enlightenment, Opp. 15-17. This is because the argument is a contrivance. There is, in fact, no reason that petitioning activity should receive greater protection from retaliatory antitrust claims than from other retaliatory claims. Indeed, as set forth in the petition, the *en banc* majority forthrightly accepted that it was overruling a panel decision that was in accord with decisions of other courts of appeals, App. 4a, 14a; and the dissent expressly stated that it would "follow other federal courts" and hold that objectively reasonable threats of litigation are pro-

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[1] Cardtoons weakly contends that, in any event, *CVD, Inc.* v. *Ratheon Co.*, 769 F.2d 842 (1st Cir. 1985), and *Alexander* v. *National Farmers Org.*, 687 F.2d 1173 (8th Cir. 1982), cannot be considered part of the conflict, because they hold that *bad faith* threats to litigate are not protected by the *Noerr-Pennington* doctrine. The MLBPA did not cite these cases as directly in conflict with the decision at issue, but rather contended that they carry a strong implication that *good faith* threats to litigate would be protected. They therefore stand for the proposition that the right to petition may extend to threats of litigation.

tected by the right to petition, *id.* 27a-28a.[2] Cardtoons' attempt to obscure a conflict that is manifest in the opinions of the court below should be rejected.

In the petition, the MLBPA showed that three courts of appeals and many district courts have held that objectively reasonable cease-and-desist letters are protected petitioning activity that may not be the subject of retaliatory suit. See Pet. 14-16; see also, *e.g.*, *Coastal States Mktg., Inc.* v. *Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983) (flatly rejecting the argument that "because threats of litigation are not directed to a government, they do not fall within the rationale of *petitioning immunity*") (emphasis supplied). After the petition was filed, yet another circuit concurred with the majority view. *PrimeTime 24 Joint Venture* v. *NBC*, No. 98-9392, 2000 WL 913348 (2d Cir. July 7, 2000). Whether it is denominated *Noerr-Pennington* protection or petitioning protection,[3] the Tenth Circuit's holding creates a conflict among the courts of appeals on the scope of protection from retaliatory suit that the right to petition provides. This Court

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[2] As a subsequent Tenth Circuit panel explained, in *Cardtoons*, the court held "that a cease-and-desist letter to a private party does not constitute petitioning activity" and thus is not protected, *Scott* v. *Hern*, 216 F.3d 897, 914-15 n.9 (10th Cir. 2000). The other courts of appeals and district courts to consider the question have reached the contrary conclusion. Pet. 14-16.

[3] Cardtoons spends several pages asserting that the court of appeals' decision is "consistent" with *McDonald* v. *Smith*, 472 U.S. 479 (1985), because it shows that the petition clause and not the *Noerr-Pennington* doctrine governs here. Opp. 20-21. Cardtoons misunderstands our point, which is that the petition clause protects objectively reasonable cease-and-desist letters from retaliatory suit under *either* the antitrust laws or state tort law. Cardtoons also asserts that its libel claim is governed by this Court's analysis in *McDonald*. As explained in the petition, however, *McDonald* is consistent with *PREI*, and both recognize that statements made in the course of petitioning activity must be made with probable cause – *i.e.*, must be objectively reasonable – and that, if they satisfy this requirement, they are protected. *See* Pet. 22-23 n.10.

should grant the petition for certiorari to resolve the conflict on this important and recurring question.

II. THERE IS NO CONFLICT BETWEEN THE RIGHT TO PETITION AND OTHER LAWS.

Cardtoons does not directly address the MLBPA's argument that the Tenth Circuit's decision is wrong on the merits. See Pet. 21-27. Instead, Cardtoons makes a series of arguments that the scope of the First Amendment right to petition cannot encompass objectively reasonable threats of litigation, because such an interpretation would lead to the invalidation of other laws that burden objectively reasonable litigation activity. These arguments do not address whether certiorari should be granted in this case. Nonetheless, we briefly show that the general contention lacks merit.

First, this contention attacks not the MLBPA's argument that the right to petition protects cease-and-desist letters, but rather this Court's holding in *PREI*, that all objectively reasonable petitioning activity is protected by the First Amendment, regardless of the subjective intent of the petitioner. It is *PREI* that calls into question the constitutionality of laws that penalize objectively reasonable petitioning activity, not the MLBPA's argument.

Second, the constitutional protection of objectively reasonable petitioning activity does not preclude sanctions for conduct that is independent of the petitioning itself. For example, Cardtoons argues that the right to petition as authoritatively construed by this Court in *PREI* eliminates the tort of abuse of process because that tort imposes liability on litigants for objectively reasonable petitioning activity. This argument simply ignores the elements of the tort:

> [T]he essential elements of abuse of process [are] first, an ulterior purpose, and second, a wilful act in the use of the process not proper in the regular conduct of the proceeding. *Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in*

> *the use of the process is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.* [W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 121, at 898 (5th ed. 1984) (emphasis supplied).]

Abuse of process is a "form of extortion," and "*it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort.*" *Id.* (emphasis supplied).[4] Moreover, to the extent that the tort of abuse of process has been more broadly construed, courts have in fact recognized that it must be narrowly interpreted and occasionally disallowed to avoid burdening petitioning activity. See, *e.g.*, *Oregon Natural Resources Council* v. *Mohla*, 944 F.2d 531, 533-34 (9th Cir. 1991).[5]

Third, Cardtoons asserts that if the petition clause protects all objectively reasonable petitioning activity, the courts would not be permitted to impose sanctions or attorneys' fees on litigants and lawyers who engage in bad faith conduct or to shift costs. The short answer to this meritless contention is

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[4] Cardtoons relies on *Grip-Pak, Inc.* v. *Illinois Tool Works, Inc.*, 694 F.2d 466 (7th Cir. 1982), holding that *Noerr-Pennington* does not protect all objectively reasonable litigation. That decision preceded both *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983), and *PREI*, 508 U.S. 49 (1993), and its holding was overruled by *PREI*.

[5] *See also DeVaney* v. *Thriftway Mktg. Corp.*, 953 P.2d 277, 284-85 (N.M. 1997), *cert. denied*, 524 U.S. 915 (1998); *Cove Road Dev.* v. *Western Cranston Indus. Park Assocs.*, 674 A.2d 1234, 1237-38 (R.I. 1996); *Protect Our Mountain Env't, Inc.* v. *District Court*, 677 P.2d 1361, 1362-64 (Colo. 1984) (en banc). *Cf. also Whelan* v. *Abell*, 48 F.3d 1247, 1254 (D.C. Cir. 1995) ("As *Noerr-Pennington* rests on the conclusion that the filing of claims in court or before administrative agencies is part of the protected right to petition, it is hard to see any reason why, as an abstract matter, the common law torts of malicious prosecution and abuse of process might not in some of their applications be found to violate the First Amendment").

that once parties are before a court, they are subject to the court's general supervisory authority. The petition clause is not implicated when courts exercise their supervisory authority over litigation and parties that are before them, unless the authority is exercised so unreasonably that it chills or burdens access to the courts. In this regard, it is noteworthy that where the imposition of sanctions may burden the right of access to the courts, the courts have been careful to protect that constitutional right. See, *e.g.*, *Townsend* v. *Holman Consulting Corp.*, 929 F.2d 1358 (9th Cir. 1990) (holding that the improper purpose clause of Rule 11(b)(1) cannot apply to an otherwise meritorious complaint even though a court could sanction a party for filing a meritorious motion for an improper purpose). [6]

In sum, Cardtoons' parade of horribles simply does not follow from the conclusion that the right to petition protects the sending of an objectively reasonable cease-and-desist letter. Moreover, and in any event, such speculation about future cases does nothing to diminish the need for the Court to review this case.

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[6] Cardtoons also claims that if the right to petition protects objectively reasonable threats of litigation, then Oklahoma may not allow a libel suit based on objectively reasonable statements made in bad faith. But the limits on Oklahoma's ability to impose tort liability on petitioning activity flow from this Court's decision in *McDonald* v. *Smith*, 472 U.S. 479 (1985). As noted *supra* at n.3, in that case, this Court held that petitioning activity is protected from liability based on libel unless statements in the petition are made with "malice" – that is, with "falsehood and the absence of probable cause." *Id.* at 484. Here, the MLBPA's statement that it "believe[d] that the activities of Cardtoons violate the valuable property rights of publicity of the MLBPA and the players' themselves" and are "illegal," *see* Pet. 5, was objectively reasonable, as all judges to address the question have held; it is therefore difficult to discern how that statement could have been made without probable cause.

III. THIS CASE IS AN EXCELLENT VEHICLE TO RESOLVE THE CONFLICT AND ADDRESS THE SCOPE OF THE RIGHT TO PETITION.

There is nothing to Cardtoons' other arguments designed to convince the Court that it should not resolve the conflict among the courts of appeals in this case.

Initially, Cardtoons asserts that because the MLBPA sent a cease-and-desist letter to Champs, a "remote third part[y]," as well as to Cardtoons, this case is unique and its facts are unlikely to recur. Opp. 8-9. This is nonsense. Champs is not a remote third party; Cardtoons contracted with Champs to print, package, warehouse and ship the cards alleged to violate Players' publicity rights. As the court of appeals explained, this made Champs a contributory infringer of the publicity rights of Major League Players and the MLBPA, see App. 42a-44a, and thus a "potential adversary," Opp. 8. Cf. also *Inwood Labs., Inc.* v. *Ives Labs., Inc.*, 456 U.S. 844, 854 (1982) (defining contributory copyright infringement). There is no difference, accordingly, between the cease-and-desist letter sent to Champs and the thousands of other (objectively reasonable) cease-and-desist letters that rights-holders send to alleged infringers every year.[7]

Second, Cardtoons suggests several times that because in retrospect it appears that a cease-and-desist letter would not have prevented the litigation between it and the MLBPA, the MLBPA is somehow estopped from arguing that cease-and-desist letters may prevent unnecessary litigation. Opp. 8, 19,

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[7] Cardtoons' additional, gratuitous characterization of the letter as "predatory," Opp. 8, simply ignores the history of this case. Cardtoons' product violated the MLBPA's and the Players' publicity rights under Oklahoma law; the Oklahoma statute was deemed to violate the First Amendment only after this Court issued its decision in *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). As all judges to consider the question have held, the letter was objectively reasonable. *See* Pet. 6, 10 & n.4.

22. Plainly, this is wrong. The MLBPA is a rights-holder and is well aware of the benefits that cease-and-desist letters and the negotiations they generate may often have. The MLBPA agrees that no policy interest can vitiate the meaning of the petition clause. But, as set forth in the petition (21-27), the policy interest in avoiding unnecessary litigation, in fact, supports the proper construction of the petition clause to protect objectively reasonable cease-and-desist letters.[8]

Last, Cardtoons maintains that the Court should not grant certiorari because this case is interlocutory. This fact does not affect the urgent need for this Court's review of the decision. Whatever might happen in the district court if this case were remanded, the court of appeals' decision on the scope of the right to petition is the law in the Tenth Circuit. The decision will have an impact beyond the geographic boundaries of the Circuit because our increasingly national economy gives litigants substantial flexibility in selecting a litigation forum.

Moreover, as described in the petition and in the briefs *amicus curiae* filed in support, the decision will have an immediate, widespread, chilling, and damaging impact on the constitutional rights and practices of rights-holders with attendant increases in litigation. See Pet. 17-21. The argument that a petition should be denied because it is interlocutory is least persuasive when the question is immunity from suit, because the substantial benefits of immunity are lost by virtue of extended litigation alone.

No further development of the factual or legal record is necessary for the Court to address the question presented. There is no dispute that the cease-and-desist letter was objectively reasonable, and the issue presented is whether such a letter is protected by the petition clause or whether a rights-

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[8] Cardtoons' brief argument that only direct petitions to the government are protected by the petition clause, Opp. 18-19, is fully answered at pages 21-27 of the Petition, and we do not repeat those arguments here.

holder may be subjected to retaliatory state tort lawsuits (in fifty possible permutations) for conduct invoking the judicial process. The MLBPA and other rights-holders lose the protection from suit to which they are constitutionally entitled if this occurs.

CONCLUSION

For the reasons set forth in the petition and herein, the petition for certiorari should be granted.

Respectfully submitted,

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